IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8648 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PINKIBEN JIVABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 8648 of 2004

MR HARDIK C RAWAL for Petitioner No. 1

MRS MH RAWAL for Petitioner No. 1

NOTICE SERVED BY DS for Respondent No. 1

MR BIPIN I MEHTA for Respondent No. 2

MR PS JOSHI for Respondent No. 3-4

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 28/07/2004

ORAL JUDGEMENT

Leave to join District Panchayat, Ahmedabad, through District Development Officer, Ahmedabad as party

respondent No.5. Draft Amendment allowed. Petitioner to carry out the same.

2. Rule. Shri Sood, learned AGP waives service of Rule on behalf of respondent No.1, learned advocate, Shri B.I. Mehta waives service of Rule on behalf of respondent No.2 and Shri Joshi, learned advocate waives service of Rule on behalf of respondents No. 3 and 4. With the consent of the parties, the matter is taken up for final hearing today.

3. By way of this Special Civil Application under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction or order quashing and setting aside the order passed by the Taluka Development Officer, City Taluka, Ahmedabad, dated 16.7.2004 in quashing and setting aside the resolutions of Nikol Gram Panchayat dated 1st March 2004, 30th April 2004 and 1st June 2004 whereby it is declared that the respondents No. 3 and 4 cease to be members of the Gram Panchayat as they have remained absent for four consecutive months from the meetings of the Panchayat without the leave of the Panchayat.

4. The petitioner is the elected Sarpanch of Nikol Gram Panchayat and respondents No. 3 and 4 were the members of the Nikol Gram Panchayat.

5. Under Section 58 of the Gujarat Panchayat Act, 1993 any member of a Village Panchayat who during his term of office is absent himself for four consecutive months from the meetings of the Panchayat without the leave of the said Panchayat shall cease to be a member and his office shall be vacant and thereupon the Panchayat shall as soon as may be inform him that the vacancy has occurred. As it was found that Naynaben K. Mandalka, respondent No.3 absented herself for 4 consecutive months from the meetings of the Panchayat without the leave of Panchayat a resolution came to be passed in its meeting held on 23rd February 2004 by which it was declared that the post of respondent No.3 has become vacant. A similar resolution also came to be passed so far as the respondent No.4 is concerned on 1.6.2004 declaring the post of respondent No.4 as vacant as the respondent No.4 also absented himself for 4 consecutive months from the meetings of the Panchayat without the leave of the Panchayat.

6. Accordingly by aforesaid Resolutions the posts held by respondents No. 3 and 4 were declared as vacant as it was found that the respondents No. 3 and 4 were

absent for 4 consecutive months from the meeting of the Panchayat without the leave of the said Panchayat. Under the provisions of the Gujarat Panchayat Act, 1993 (hereinafter referred to as "the Act") and more particularly Section 58 of the Act, any member of the Village Panchayat who during his term or office is absent for 4 consecutive months from the meetings of the Panchayat without leave of the said Panchayat shall cease to be a member and his office shall be vacant and thereupon the Panchayat shall as soon as may be inform him that the vacancy has occurred. Under sub-section (2) of Section 58, any dispute as to whether a vacancy has occurred or has not occurred under Section 58(1) shall be referred for decision to the competent authority whose decision shall be final provided that such reference shall not be entertained if it is made after the expiry of 15 days from the date on which the Panchayat informs under sub-section (1) the member as to the vacancy. Under the provisions of the Act, District Panchayat is the competent authority to decide the dispute. Specific powers are given to the District Panchayat to resolve the dispute under sub-section (2) of Section 58 of the Act. Inspite of the aforesaid facts and provisions of law the Taluka Development Officer exercising the powers under Section 249 of the Act quashed and set aside the aforesaid resolutions by which the respondents No. 3 and 4 were informed with regard to occurring of the vacancy by holding that the resolutions and the meeting in which the resolutions came to be passed were illegal and without following any procedure as required to be followed under Rule 54 of the Gujarat Panchayat Rules and quashed and set aside both the aforesaid resolutions by which the respondents No. 3 and 4 were informed with regard to occurring of the vacancy under Section 58(1) of the Act.

7. The said order came to be passed by the Taluka Development Officer on 16.7.2004 and vide Agenda dated 16.7.2004 itself the T.D.O. called the special meeting of the Panchayat on 20th July 2004 for election of the Up-Sarpanch. Apprehending that by virtue of the order dated 16.7.2004 the respondents No. 3 and 4 would be now permitted to cast their votes and also being aggrieved and dissatisfied with the order passed by the T.D.O., City Taluka Panchayat dated 16.7.2004, the petitioner Sarpanch of Nikol Gram Panchayat has preferred the present Special Civil Application. By way of ad-interim relief the petitioner has also prayed for staying further execution, operation and implementation of the order passed by the TDO dated 16.7.2004 as according to the petitioner if the order dated 16th July 2004 is not

implemented then respondents No. 3 and 4 would be permitted to cast their votes in the election of the Up-Sarpanch in the meeting to be convened on 28th July 2004.

8. This Court issued notice on 19th July 2004 upon the respondents making it returnable on 27.7.2004 and in view of the fact that the election of the Up-Sarpanch of the Gram Panchayat was to take place on 28th July 2004, the following order came to be passed;

"Leave to amend and join Mrs. Naynaben K. Mandalka and AShokbhai K Patel as respondent nos. 3 and 4.

2. Looking to the urgency as the election of Up-Sarpanch, Nikol Gram Panchayat is to be held on 20.7.2004, the matter is taken up today at 2.15 p.m.

3. It is the contention on behalf of the petitioners that the TAluka Development Officer, Ahmedabad has no jurisdiction to pass any order under Section 58(2) of the Gujarat Panchayats Act, 1993 and by order dated 16.7.2004, the Taluka Development Officer has passed an order quashing and setting aside a resolution passed by the Panchayat and now by which the respondent no. 3 and 4 i.e. Mrs. Naynaben K. Mandalka and Ashokbhai K. Patel would be permitted to cast their votes in the election of Up-Sarpanch which is scheduled on 20.7.2004. He has further submitted that the said decision was taken by the Taluka Development Officer on 16.7.2004 and on the very day, the agenda is issued for convening the special meeting of Nikol Gram Panchayat for the purpose of election of Up-Sarpanch of the Gram Panchayat and on the very day the election is scheduled on 20.7.2004. This shows the malafides on the part of the concerned respondents. Notice returnable on 27.7.2004. In the meantime, by way of ad-interim relief, the election of the Up-Sarpanch of Nikol Gram Panchayat may go on as scheduled as per the notice dated 16.7.2004. However, the respondents are directed to keep the votes of respondent no. 3 and 4 i.e. Mrs. Naynaben K. Mandalka and AShokbhai K. Patel in a sealed cover and the result of the election of the Up-Sarpanch, Nikol Gram Panchayat should not be declared till the

next returnable date. DIRECT SERVICE PERMITTED TODAY."

Accordingly the election of the Up-Sarpanch is already held and pursuant to the order passed by this Court the result of election of the Up-Sarpanch is not declared. In the meantime, no confidence motion is proposed against the Sarpanch of Nikol Gram Panchayat, i.e. petitioner herein and the meeting is convened to discuss the no confidence motion against the petitioner on 30th July 2004. Accordingly the petitioner has submitted an amendment seeking to quash and set aside the notice/agenda dated 22.7.2004 by which the Talati-cum-Mantri has convened a Special Meeting on 30th July 2004 to discuss the no confidence motion against the petitioner and has also prayed for an ad-interim relief restraining the respondents from calling the meeting on 30th July 2004 as per the agenda dated 22.7.2004. Draft amendment is allowed. THus, the main challenge to the present Special Civil Application is the order passed by the T.D.O. City Taluka Panchayat dated 16.7.2004 by which the resolutions passed by the Nikol Gram Panchayat informing the respondents No. 3 and 4 with regard to occurrence of the vacancy under Section 58(1) of the Act is quashed and set aside.

9. Shri Hardik Raval, learned advocate appearing on behalf of the petitioner has vehemently submitted that the order passed by the T.D.O., City Taluka Panchayat, AHmedabad dated 16.7.2004 is absolutely illegal and without any authority and jurisdiction. He has further submitted that the impugned order dated 16.7.2004 is malafide and colourable exercise of power. He has further submitted that the said order is passed under political pressure and only with a view to see that the petitioner is ousted and that respondents No. 3 and 4 may cast their votes in the election of Up-Sarpanch and in the meeting for no confidence motion which is proposed against the petitioner. He has relied upon the provisions of SEction 58 of the Act. He has submitted that under the guise of general powers of superintendence under Section 249 of the Act, the Taluka Development Officer cannot usurp the power which is not with him. He has further submitted that the competent authority under the provisions of the Act to decide the dispute with regard to the vacancy which has occurred or not is the District Panchayat and not the T.D.O. Under the circumstances, the impugned order dated 16.7.2004 is required to be quashed and set aside.

10. On the other hand Shri B.I. Mehta, learned advocate appearing on behalf of respondent No.2, T.D.O. has submitted that the respondent No.2 has exercised the powers under Section 249 of the Act. Under Section 249 of the Act, the TDO is authorised to suspend and/or quash and set aside the resolutions if in his opinion the execution of any order or resolution of a Panchayat is unlawful. Therefore the TDO is justified in quashing and setting aside the impugned resolutions by which the respondents No. 3 and 4 were informed with regard to occurrence of the vacancy under Section 58 of the Act. He has further submitted that the TDO on the basis of the report called for by him has found that the resolutions were passed in a meeting which was not convened as per the procedure required to be followed more particularly under Rule 54 of the Gujarat Panchayat Procedure Rules and therefore the aforesaid resolutions are rightly quashed and set aside by the TDO. Shri Sood, the learned AGP who appears on behalf of respondent No.1 has submitted that pursuant to the interim order passed by the Court the election of Up-Sarpanch is already held and it is kept in sealed cover as per the order passed by this Court.

11. Heard the learned advocates appearing on behalf of the parties. The resolutions came to be passed by the Nikol Gram Panchayat with regard to occurrence of the vacancy under Section 58 of the Act as it was found that the respondents No. 3 and 4 had absented for 4 consecutive months from the meetings of the Panchayat without the leave of the said Panchayat and the resolutions came to be passed to inform the respondents No. 3 and 4. Both the respondents No. 3 and 4 were informed accordingly. Under sub-section (2) of Section 58 any dispute as to whether a vacancy has or has not occurred shall be referred for decision to the competent authority whose decision shall be final provided that such reference shall not be entertained if it is made after the expiry of 15 days from the date on which the Panchayat informs under sub-section (1) of Section 58 the member as to the vacancy under the provisions of the Gujarat Panchayat Act. The District Panchayat is the competent authority to decide the dispute as to whether a vacancy has or has not occurred under Section 58 of the Act. There is a specific power conferred on the District Panchayat. When there are specific powers conferred upon a particular authority, by exercising general powers another authority cannot exercise the powers under Section 249 of the Act which is a general supervisory power. When there is a specific power conferred on the District Panchayat under sub-section (2) of Section 58,

then the Taluka Development Officer could not have exercised the general supervisory power. Indirectly the T.D.O. has exercised the powers under sub-section (2) of Section 58 of the Act which he is not possessing. Under the circumstances, the order passed by the T.D.O. dated 16.7.2004 is without any jurisdiction and authority in law. He could not have decided the dispute with regard to occurrence of vacancy under Section 58 Act.

11.1. There is another aspect of the matter also. Under sub-section (2) of Section 58 even the competent authority is required to entertain the dispute if it is referred within 15 days from the date on which the Panchayat informs under sub-section (1) of Section 58 the member as to the vacancy. It is alleged by the petitioner that respondent No.3 was informed on 5th March 2004 and respondent No.4 was informed on 2nd June 2004 with regard to the occurrence of the vacancy and so far as respondent No.3 is concerned dispute is not referred/raised within a period of 15 days even before the TDO. Under the circumstances, even if dispute could have been exercised by TDO then also the dispute could not have been decided by the respondent No.2 if the reference is after a period of 15 days. By exercising power under Section 249 of the Act, the TDO has passed an order which could not have been passed even by the competent authority (District Panchayat) (after 15 days). As the dispute was referred after a period of 15 days, which could not have been done by the competent authority is done by the TDO exercising power under Sec. 249 of the Act which is also not permissible. Under the circumstances, the impugned order passed by the respondent No.2 dated 16.7.2004 is required to be quashed and set aside.

12. The dispute as to whether a vacancy has or has not occurred under Section 58 is required to be decided by the competent authority, who is the District Panchayat in the present case. Under the circumstances, the dispute with regard to occurrence of the vacancy of respondents No.3 and 4 is hereby referred to the District Panchayat, Ahmedabad for taking an appropriate decision as required under sub-section (2) of Section 58 of the Act. It will be open for the petitioner to point out the relevant provisions, more particularly provisions of sub-section (2) of Section 58 to the District Panchayat. As and when such a plea is raised, the District Panchayat may consider the same in accordance with the provisions of Section 58(2) of the Act. Until then, the ad-interim relief granted earlier on 19.7.2004 with regard to election of Deputy Sarpanch of Panchayat shall remain in

force.

12.1. So far as the meeting which is to be convened on 30th July 2004 to discuss the no confidence motion against the petitioner is concerned, by way of interim relief it is directed that the meeting which is scheduled to be convened on 30th July 2004 to discuss the no confidence motion against the petitioner may go on as scheduled as per the notice dated 22.7.2004. However, the respondents are directed to keep the votes of respondents No. 3 and 4, i.e. Mrs. Naynaben K. Mandalka and Ashokbhai K. Patel in a sealed cover and the result of the meeting should not be declared till the dispute is decided by the District Panchayat as referred earlier. THe District Panchayat is directed to decide and dispose of the dispute exercising the power under Section 58 of the Act within a period of two weeks from the date of receipt of this order after giving opportunity to all the concerned parties without in any way being influenced by the observations made in this judgment, on its own merits and strictly in accordance with the provisions of Section 58 of the Act. THe petition is allowed accordingly. Rule is made absolute to the aforesaid extent with no order as to costs. Direct service is permitted.

rmr. [M.R. Shah, J.]